A

Hazly bin Ali v Public Prosecutor and another appeal

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS T-05–118–05 OF 2012 AND T-05–119–05 OF 2012
BALIA YUSOF, ROHANA YUSUF AND ZAKARIA SAM JJCA
18 JULY 2014

C *Criminal Law — Arms offences — Discharging firearm in commission of robbery — Firearm discharged during robbery of jewellery shop committed by appellant and accomplice — Pistol and stolen jewellery found pursuant to information given by appellant — Whether lack of identification parade and failure to identify pistol affected prosecution's case — Doubt as to identity of person*
D *who fired the shot — Whether appellant guilty under ss 3 and 4 of the Firearms (Increased Penalties) Act 1971 ('the Act') — Charge under s 3 of the Act amended to charge of gang robbery under s 395 of the Penal Code*

E *Criminal Law — Penal Code — s 34 — Common intention — Two robberies committed by appellant and accomplices — Whether same modus operandi employed showed pre-planning*

F *Criminal Procedure — Charge — Amendment — Charge under s 3 of the Firearms (Increased Penalties) Act 1971 amended to charge of gang robbery under s 395 of the Penal Code — Whether failure to comply with procedures stipulated in ss 158 and 162 of the Criminal Procedure Code ('the CPC') in amending the charge — Whether requirement under s 158 of the CPC mandatory*
G *— Overwhelming evidence to support amended charge — Whether prosecution case compromised by failure to comply with procedural requirement — Whether trial judge should have resorted to s 167 of the CPC*

H *Evidence — Presumptions — Adverse inference under s 114(g) of the Evidence Act 1950 — Firearms offence — Failure of prosecution to produce accomplices as witnesses — Whether prima facie case made out — Whether there was necessity for calling witnesses — Whether adverse inference not drawn*

I There were two incidents of robberies that took place at two different goldsmith shops by the same group of people who employed the same *modus operandi*. The two incidents took place about 15 minutes apart on the same day. The first robbery was at Kedai Tukang Emas Berkat and the second at Yong Seng Tukang Emas. Ibrahim bin Che Kok ('SP2') who was at Kedai Tukang Emas Berkat identified as the appellant as one of the robbers who had held and

pointed a pistol towards SP2. For this, the appellant was charged under s 4 of the Firearms (Increased Penalties) Act 1971 ('Act 37') read together with s 34 of the Penal Code ('the second charge'). Lee Jin Rong ('SP6') who was at Yong Seng Tukang Emas also identified the appellant as one of the robbers who had pointed a pistol towards SP6. As the robbers ran off, a shot was fired by the appellant towards SP6. The robbery incident at the second shop was confirmed by an eyewitness, SP8 (the mother of SP6) who was at the scene during the incident. SP7, a neighbour who lived on the opposite side of the road, was another eyewitness to the incident. For this, the appellant was charged under s 3 of Act 37 read together with s 34 of the Penal Code ('Code') ('the first charge'). The appellant was subsequently arrested. Relying on information given by the appellant, the police found a pistol at a garage behind the shed of the appellant's father's house. Also relying on information given by the appellant, the police also found the jewelleries robbed in both incidents in another gold smith shop. The appellant in his defence claimed that he had been forced by another person to join the group of robbers. At the end of the trial, the learned trial judge ('the judge') amended the first charge to a charge of gang robbery under s 395 of the Code read together with ss 397 and 34 of the same Code. The appellant was found guilty, convicted and sentenced for both charges. The prosecution appealed against the decision in the first charge on the grounds that the judge had failed to comply with the procedures stipulated in ss 158 and 162 of the Criminal Procedure Code ('the CPC') in amending the first charge. The appellant appealed against the conviction and sentence on the grounds that (i) the judge ought to have invoked s 114(g) of the Evidence Act 1950 against the prosecution for failure to produce the appellant's accomplices and SP2's wife as witnesses; (ii) the pistol used in the crime was not identified by the witness; (iii) there was insufficient evidence adduced to prove the identity of the appellant; and (iv) failure to prove common intention as there was no evidence to support a pre arranged plan was made.

Held, dismissing the appeal and the cross-appeal:

(1) The judge had amended the first charge because he found doubt as to the identity of the person who fired the shot towards SP6. There was also a doubt as to whom the shot was fired at. To constitute an offence under s 3 of Act 37 as contained in the first charge, one important ingredient to be proven was that there was a firing of the pistol by the appellant, with the intention to cause the death or injury to SP6. A doubt as to the identity of the person who fired the shot or to whom the shot was fired would not establish the offence under the first charge. The judge had not erred in amending the first charge (see paras 20 & 23–24).

(2) The requirement under s 158 is not always mandatory and the word 'shall' used in that provision does not ipso facto make it mandatory, but it would have to depend on the facts of each case. Section 158 was not a mandatory requirement on the facts of the present case. As the nature of

A the amended charge was in essence quite similar in nature with that of the original first charge, there was no prejudice to either party even if s 158 was not strictly observed. There was overwhelming evidence to substantiate a charge under s 395 read with s 397 of the Code in relation to the robbery at Yong Seng Tukang Emas shop. Thus, the prosecution case was not compromised by the failure of the judge to comply with the procedural requirement when the evidence to support the amended charge was so overwhelming (see paras 29–31).

(3) The judge could have resorted to s 167 of the CPC instead. Section 167 allows the court to convict an accused for a different offence if the evidence reveals so, even though he was not charged with that offence. On the facts and evidence of the present case, the judge could have invoked s 167 and convicted the appellant on the offence of gang robbery under s 395 read together with ss 397 and 34 without having to resort to amending the charge the way he did. In such a situation, there would be no necessity to comply with either s 158 or s 162 of the CPC. Thus, the judge's failure was not fatal and no miscarriage of justice had been occasioned by the amendment undertaken by the judge (see para 32).

(4) A prima facie case was made out without any of the testimony of the witnesses suggested by the appellant. That being the case, there was no necessity for the prosecution to bring forward any other witness to establish its case. In any given case the right to call a witness to prove a case lies with the prosecution. Hence, there was no adverse inference that could be drawn though other witnesses were not before the court (see paras 39–40).

(5) All the prosecution witnesses listed were in fact offered to the defence. As such, there was no issue of withholding or suppression of evidence. A suppression of evidence envisaged by s 114(g) can only be invoked if there is suppression of material witness and not just any witness (see para 41).

(6) The testimonies of SP2 was clear in establishing the identity of the appellant. The judge found the evidence of SP2 unshaken despite being severely cross-examined. SP2's evidence had convinced the judge on the identity of the appellant which the judge was entitled to do. Despite the lack of identification parade, it did not affect the prosecution's case (see paras 43–44).

(7) The pistol used in the commission of the crime was tendered as exh p14A. There was no dispute that a gun was used in the robbery. Thus, although exh p14A was not identified by SP2, it was never raised as an issue during the trial. The appellant did not challenge the testimonies of SP2 that a gun was pointed at him during the robbery. The need to tender any exhibit would depend on the facts of each particular case. In the

present case the evidence was clear that the appellant was pointing a gun to SP2 and thus whether or not SP2 identified the gun used was quite immaterial. Moreover, the incriminating weapon was discovered in a pail behind the house of the appellant's father, as a result of the information given by the appellant himself. This was clearly stated in the testimony of the appellant himself. In view of such clear evidence, there was no necessity to identify the pistol by SP2 (see para 45).

(8) The judge found that in both the incidents the same modus operandi was employed by the appellant. The robberies were committed using the same car where the appellant was armed with a pistol while the other two came into the shop, broke the show case and removed the jewelleries with the appellant holding guards on the victim. The *modus operandi* employed disclosed that each of them knew their respective roles and this could not have happened without any planning (see para 46).

[Bahasa Malaysia summary

Dua kejadian rompakan yang telah berlaku di dua kedai emas berlainan oleh kumpulan orang sama yang telah menggunakan modus operandi yang sama. Dua kejadian itu telah berlaku dengan jarak lebih kurang 15 minit pada hari yang sama. Rompakan pertama berlaku di Kedai Tukang Emas Berkat dan yang kedua berlaku di Yong Seng Tukang Emas. Ibrahim bin Che Kok ('SP2') yang berada di Kedai Tukang Emas Berkat telah mengenal pasti perayu sebagai salah seorang daripada perompak yang telah memegang dan mengacu pistol ke arah SP2. Untuk ini, perayu telah dituduh di bawah s 4 Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta 37') yang dibaca bersama s 34 Kanun Keseksaan ('Kanun') ('pertuduhan kedua'). Lee Jin Rong ('SP6') yang berada di Yong Seng Tukang Emas juga mengenal pasti perayu sebagai salah seorang perompak yang telah mengacu pistol ke arah SP6. Apabila perompak-perompak itu melarikan diri, satu tembakan telah dilepaskan oleh perayu ke arah SP6. Kejadian rompakan di kedai kedua itu telah disahkan oleh saksi utama SP8 (ibu SP6) yang berada di tempat kejadian berlaku. SP7, seorang jiran yang tinggal bertentangan jalan, adalah seorang lagi saksi utama kepada kejadian itu. Untuk ini, perayu telah dituduh di bawah s 3 Akta 37 dibaca bersama s 34 Kanun ('pertuduhan pertama'). Perayu kemudian telah ditangkap. Dengan bergantung kepada maklumat yang diberikan oleh perayu, polis menjumpai pistol di garaj belakang bangsal rumah bapa perayu. Juga bergantung kepada maklumat yang diberikan oleh perayu, polis juga menjumpai barang kemas yang dirompak di kedua-dua kejadian di kedai emas satu lagi. Perayu dalam pembelaannya mendakwa bahawa dia telah dipaksa oleh seorang lain untuk menyertai kumpulan perompak itu. Di akhir perbicaraan, hakim perbicaraan yang bijaksana ('hakim') telah meminda pertuduhan pertama kepada pertuduhan dengan rompakan di bawah s 395 Kanun Keseksaan dibaca bersama dengan ss 397 dan 34 Kanun yang sama. Perayu telah didapati bersalah, disabit dan dihukum kerana dua pertuduhan.

A Pendakwaan telah merayu terhadap keputusan dalam pertuduhan pertama atas alasan bahawa hakim telah gagal mematuhi prosedur yang ditetapkan dalam ss 158 dan 162 Kanun Tatacara Jenayah ('KTJ') dengan meminda pertuduhan pertama. Perayu telah merayu terhadap sabitan dan hukuman atas alasan bahawa: (i) hakim itu patut menggunakan s 114(g) Akta Keterangan 1950 B terhadap pendakwaan kerana gagal mengemukakan rakan sejenayah perayu dan isteri SP2 sebagai saksi-saksi; (ii) pistol yang digunakan dalam jenayah itu tidak dikenal pasti oleh saksi; (iii) tidak terdapat keterangan mencukupi yang dikemukakan untuk membuktikan identiti perayu; dan (iv) kegagalan untuk membuktikan niat bersama kerana tiada keterangan untuk menyokong C rancangan yang telah diatur telah dibuat.

Diputuskan, menolak rayuan dan rayuan balas:

(1) Hakim telah meminda pertuduhan pertama kerana beliau mendapati D terdapat keraguan berhubung identiti orang yang melepaskan tembakan ke arah SP6. Juga tiada keraguan kepada siapa tembakan itu dilepaskan. Untuk menjadikan satu kesalahan di bawah s 3 Akta 37 sebagaimana terkandung dalam pertuduhan pertama, satu elemen penting yang perlu dibuktikan adalah di mana terdapat tembakan pistol oleh perayu, dengan E niat menyebabkan kematian atau kecederaan kepada SP6. Keraguan berhubung identiti orang yang melepaskan tembakan atau kepada siapa tembakan dilepaskan tidak membuktikan kesalahan di bawah pertuduhan pertama. Hakim tidak terkhilaf meminda pertuduhan pertama itu (lihat perenggan 20 & 23–24).

F

(2) Keperluan di bawah s 158 tidak sentiasa mandatori dan perkataan 'shall' digunakan dalam peruntukan tersebut tidak ipso facto menjadikannya mandatori, tetapi ia bergantung kepada fakta setiap kes. Seksyen 158 bukan keperluan mandatori berdasarkan fakta kes ini. Oleh kerana sifat G pertuduhan yang dipinda secara intipati lebih kurang sama sifatnya dengan pertuduhan pertama yang asal, tiada prejudis pada mana-mana pihak meskipun s 158 tidak dipatuhi sepenuhnya. Terdapat banyak keterangan untuk mengukuhkan pertuduhan di bawah s 395 dibaca bersama s 397 Kanun berkaitan rompakan di kedai Yong Seng Tukang Emas. Oleh itu, kes pendakwaan tidak terjejas dengan kegagalan hakim H itu untuk mematuhi keperluan prosedural apabila keterangan untuk menyokong pertuduhan yang dipinda amat banyak (lihat perenggan 29–31).

(3) Sebaliknya hakim boleh menggunakan s 167 KTJ. Seksyen 167 I membenarkan mahkamah untuk mensabitkan tertuduh untuk kesalahan berbeza jika bukti menunjukkan begitu, jikapun dia tidak dituduh kerana kesalahan tersebut. Berdasarkan fakta dan bukti kes ini, hakim boleh menggunakan s 167 dan mensabitkan perayu atas kesalahan rompakan berkumpulan di bawah s 395 dibaca bersama ss 397 dan 34

tanpa perlu meminda pertuduhan sebagaimana dilakukannya. Dalam keadaan sebegini, tiada keperluan untuk mematuhi sama ada s 158 atau s 162 KTJ. Oleh itu, kegagalan hakim tidak memudaratkan dan tiada salah pelaksanaan keadilan telah disebabkan oleh pindaan yang dilakukan hakim (lihat perenggan 32).

(4) Kes prima facie telah dibuktikan tanpa apa-apa testimoni saksi yang dicadangkan oleh perayu. Oleh demikian, tiada keperluan untuk pendakwaan mengemukakan mana-mana saksi lain untuk membuktikan kesnya. Dalam apa-apa kes yang dikemukakan hak untuk memanggil saksi bagi membuktikan kes terletak pada pendakwaan. Justeru, tiada inferens bertentangan yang boleh dibuat meskipun saksi-saksi lain tidak dihadapkan ke mahkamah (lihat perenggan 39–40).

(5) Kesemua saksi pendakwaan yang disenaraikan telah pun ditawarkan kepada pembelaan. Oleh itu, tiada isu menahan atau menyembunyikan keterangan. Penahanan keterangan yang termaktub di dalam s 114(g) hanya boleh digunakan jika penyembunyian saksi utama dan bukan hanya mana-mana saksi (lihat perenggan 41).

(6) Testimoni SP2 jelas membuktikan identiti perayu. Hakim mendapati keterangan SP2 tidak berubah meskipun telah diperiksa balas dengan teliti. Keterangan SP2 meyakinkan hakim tentang identiti perayu yang mana hakim itu berhak berbuat demikian. Jikapun tiada barisan pengecaman, ia tidak menjejaskan kes pendakwaan (lihat perenggan 43–44).

(7) Pistol yang digunakan dalam perlakuan jenayah itu telah ditenderkan sebagai eksh P14A. Tiada pertikaian bahawa pistol telah digunakan dalam rompakan itu. Oleh itu, meskipun eksh P14A tidak dikenal pasti oleh SP2, ia tidak pernah ditimbulkan sebagai satu isu sepanjang perbicaraan. Perayu tida mencabar testimoni SP2 bahawa pistol telah diacukan ke arahnya semasa rompakan itu. Keperluan untuk menenderkan apa-apa ekshibit akan bergantung kepada fakta setiap kes tertentu. Dalam kes ini keterangan adalah jelas bahawa perayu telah mengacukan pistol ke arah SP2 dan oleh itu sama ada atau tidak SP2 telah mengecam pistol yang digunakan tidak begitu penting. Tambahan pula, senjata yang menunjukkan kesalahan itu telah dijumpai di dalam baldi di belakang rumah bapa perayu, hasil daripada maklumat yang diberikan oleh perayu sendiri. Ini jelas dinyatakan di dalam testimoni perayu sendiri. Berdasarkan keterangan yang jelas, tiada keperluan untuk mengenal pasti pistol oleh SP2 (lihat perenggan 45).

(8) Hakim mendapati dalam kedua-dua kejadian modus operandi yang sama telah digunakan oleh perayu. Rompakan-rompakan itu telah dilakukan menggunakan kereta yang sama di mana perayu bersenjatakan pistol manakala dua orang lain yang masuk ke kedai itu, telah memecah

bekas pameran dan mengambil barang kemas itu dan perayu menahan mangsa. Modus operandi yang digunakan menunjukkan setiap daripada mereka mengetahui peranan masing-masing dan ini tidak mungkin berlaku tanpa apa-apa perancangan (lihat perenggan 46).]

Notes

For a case on adverse inference under s 114(g) of the Evidence Act 1950, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2416.

For cases on discharging firearm in commission of robbery, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 47–49.

For cases on s 34 of the Penal Code, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2107–2135.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16; [1985] CLJ (Rep) 19, SC (refd)
Arumugan s/o Muthusamy v PP [1998] 3 MLJ 73, FC (refd)
Chua Keem Long v PP [1996] 1 SLR 510, HC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)
Hee Nyuk Fook v PP [1988] 2 MLJ 360, SC (folld)
Jazuli bin Mohsin v PP [1990] 2 MLJ 190, HC (refd)
Mamasobri bin Useng v PP [2011] MLJU 503; [2011] 6 CLJ 377, FC (folld)
Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ (rep) 221, SC (refd)
Ng Terk Chai v PP and other appeals [2013] 2 MLJ 375, CA (distd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 158, 158(2), 162, 166, 167, 422
Evidence Act 1950 s 114(g)
Firearms (Increased Penalties) Act 1971 s 3
Penal Code ss 34, 302, 392, 395, 397

Appeal from: Criminal Trial Nos 45D-11 of 2010 and 45D-09 of 2010 (High Court, Kuala Terengganu)

Ibrahim bin Kamaruddin (Zulkifli bin Mohd Termizi and Muhd Hisham bin Abdul Rahim with him) (Abdul Razak, Zulkifli & Partners) in Criminal Appeal No T-05–118–05 of 2012 for the appellant.
Wan Shaharuddin bin Wan Ladin (Ahmad Ishrakh with him) (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No T-05–119–05 of 2012 for the appellant.
Wan Shaharuddin bin Wan Ladin (Ahmad Ishrakh with him) (Deputy Public

Prosecutor, Attorney General's Chambers) in Criminal Appeal No T-05–118–05 of 2012 for the respondent.

Ibrahim bin Kamaruddin (Zulkifli bin Mohd Termizi and Muhd Hisham bin Abdul Rahim with him) (Abdul Razak, Zulkifli & Partners) in Criminal Appeal No T-05–119–05 of 2012 for the respondent

Rohana Yusuf JCA (delivering judgment of the court):

[1] Hazly bin Ali, the appellant in Rayuan No T-05–118–05 of 2012 was charged and tried in the High Court at Kuala Terengganu for two offences of robbery and the two charges against him read as follows:

> Pertuduhan Pindaan Pertama (the first charge)
>
> Bahawa kamu bersama-sama seorang yang telah dijatuhkan hukuman dan seorang lagi yang masih bebas, pada 13 April 2009 jam lebih kurang 4.15 petang di kedai Yong Seng Tukang Emas, No. 196 Jalan Majlis, Paka, di dalam Daerah Dungun, dalam Negeri Terengganu, telah melakukan rompakan di tempat tersebut dan semasa melakukan rompakan tersebut, kamu telah melepaskan satu das tembakan dengan menggunakan senjata maut iaitu pistol dengan niat untuk menyebabkan kematian atau kecederaan ke atas seorang lelaki cina nama Lee Jin Rong, No. KP 780823-11-5117, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 3 Akta Senjata Api (Penalti Lebih Berat) 1971 (Akta 37) dan boleh dihukum di bawah seksyen yang sama Akta tersebut dan dibaca bersama dengan Seksyen 34 Kanun Keseksaan.
>
> Pertuduhan Pindaan Kedua (the second charge)
>
> Bahawa kamu bersama-sama seorang yang telah dijatuhkan hukuman dan seorang lagi yang masih bebas, pada 13 April 2009 jam lebih kurang 4.10 petang di kedai Tukang Emas Berkat, Fatimatun Zhariah, No. 6 Kedai Arked MARA, Jalan Pasar Paka, di dalam Daerah Dungun dalam Negeri Terengganu, telah melakukan rompakan di tempat tersebut dan semasa melakukan rompakan tersebut, kamu telah menunjukkan sepucuk pistol kepada seorang lelaki Melayu nama Ibrahim bin Che Kok, No. KP 550226-03-5449 yang mendatangkan ketakutan mati atau cedera dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 4 Akta Senjata Api (Penalti Lebih Berat) 1971(Akta 37) dan boleh dihukum di bawah Seksyen yang sama Akta tersebut dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] Having found that a prima facie case was established at the end of the prosecution case, the learned judge called the appellant to enter his defence. At the end of the trial, the learned judge amended the first charge from a charge under s 3 of the Firearms (Increased Penalties) Act 1971 to that of robbery under s 395 read together with s 397 and s 34 of the Penal Code. The appellant was then convicted under the amended first charge and sentenced to 15 years imprisonment with two strokes of whipping. For the second charge the appellant was convicted and imposed with a sentence of life imprisonment together with six strokes of whipping.

[3] Both parties lodged their appeals against the decision of the High Court. Vide Rayuan No T-05–119–05 of 2012, the learned deputy public prosecutor ('the DPP') is appealing against the order of the learned trial judge on the amendment to the first charge. While the appellant in Rayuan No T-05–118–05 of 2012, is appealing against the conviction and sentence imposed on him on the second charge.

[4] We heard both the appeals together on 10 October 2013. Having given our anxious consideration to both the oral and written submissions of parties, we had unanimously dismissed both the appeals. We now set out the reasons for our decision.

BRIEF FACTS

[5] There were two incidents of robberies that took place at two different goldsmith shops by the same group of people who employed the same modus operandi. The two incidents took place about 15 minutes apart on the same day of 13 April 2009 in Paka, Terengganu. The first robbery was at Kedai Tukang Emas Berkat Fatimatun Zhariah of No 6, Kedai Aked Mara, Jalan Pasar, Paka, Terengganu and the second at Yong Seng Tukang Emas of No 196, Jalan Majlis, Paka, Terengganu.

[6] The first incident took place at 4pm on 13 April 2009 when Ibrahim bin Che Kok ('SP2') was at his shop known as Tukang Emas Berkat Fatimatun Zhariah. According to him a Malay man (later identified as the appellant) came into his shop purportedly to clean one piece of silver bracelet. Soon after, the appellant went out of SP2's shop and returned to the shop, sat on the high chair in SP2's shop, holding and pointing a pistol towards SP2. At that same time, another two friends of the appellant came into the shop, carrying a baseball bat. They broke the showcase displaying the jewelleries with the baseball bat and took all the jewelleries into a bundle. The whole incident took place within five minutes and throughout that time the appellant remained seated on the high chair pointing a pistol towards SP2. SP2 suffered a loss of about RM300,000 from the robbery. This incident constituted the second charge against the appellant.

[7] The second incident took place at the shop known as Yong Seng Tukang Emas belonging to Lee Jin Rong ('SP6'). According to SP6 at about 4.15pm on 13 April 2009 while he was inside his shop he saw a car suddenly stopped in front of his shop. A Malay man (later identified as the appellant) came out of the car holding a pistol in his hand and went straight into his shop. SP6 stood up to move to the back of his shop but was ordered to stop by the appellant. At that same time, the appellant was pointing a pistol towards SP6. Another two men came out of the car went into the shop, broke the jewellery showcase with

a baseball bat and collected all the jewelleries on display and bundled all the jewelleries. After that, all the three men ran off towards the car and a shot was fired by the appellant towards SP6.

[8] The robbery incident at the second shop was confirmed by an eyewitness, 'SP8' (the mother of SP6) who was at the scene during the incident. 'SP7', a neighbour who lived on the opposite side of the road, was another eyewitness to the incident. This second incident constitutes the first charge against the appellant.

[9] The next day after the incident, that is on 14 April 2009 at about 10am the police discovered a car, Proton Waja bearing registration No BHY 8746 at the area of Air Terjun Menderu at Kerteh, Kemaman in Terengganu. On the same day, at 3.30pm the appellant was arrested in front of another gold smith shop, Kedai Emas Kenari at Jalan Che Teng in Kemaman Terengganu. A sling bag and a national registration card of the appellant was found and confiscated.

[10] During investigation, the appellant informed the police that the pistol he used in both the robbery incidents was kept in a shed behind his house at Taman Wan Adnan at Kerteh, in Terengganu. Relying on that information given by the appellant, the police found a pistol (exh P14A) together with a magazine (exh P14B) and seven bullets in a pail at a garage behind the shed of the house of the appellant's father. Also found in the same location, was an empty bullet casing and a broken baseball bat (exh P21).

[11] Through their investigation, as well as relying on the information given by the appellant, the police found the jewelleries robbed in both incidents (exh P30A–K) in another gold smith shop known as Kedai Emas Kenari at Kemaman, Terengganu. Incidentally, the appellant was arrested in front of this shop by the police on 16 April 2009.

[12] On 2 August 2009 'SP1' conducted ballistic test on the pistol (exh P14A) using the magazine and bullet received from the investigating officer. The pistol was found to be in serviceable condition.

[13] At the end of the prosecution case, the learned trial judge made a finding that the prosecution had made out a prima facie case on both the charges against the appellant. The appellant was then called to enter his defence. The appellant elected to give evidence on oath.

DEFENCE

[14] The appellant first denied any involvement in both the robbery incidents and claimed that he was forced by Mat Yie to join the group. He said

Mat Yie told him that he was having a project '... menyamun kedai emas di Paka ...'. The appellant said his car was used in the robbery where he was only made a driver. He narrated in detail on the account of what happened during the robberies. At the first shop, he was asked to explore the surrounding area on the pretext of wanting to clean a silver bracelet at the shop. His narration tallied in essence with the case of the prosecution though astute towards his non-involvement in the actual act but remaining in the car as a driver while the act of robbery was committed by all the other accomplices. After both the robberies the appellant stated that he was directed by Mat Yie to drive towards Kerteh in order to go back to the appellant's house. They went to Air Terjun Menderu where they distributed the jewelleries between themselves and thereafter, each one of them went back to their respective home and left the car used for the robbery at Air Terjun Menderu.

[15] The next day, the appellant said he received a telephone call from Mat Yie informing of a plan to sell the jewelleries to another goldsmith shop in Kemaman. They went separately to Kemaman the next day where the appellant was arrested. After his arrest, he was brought to his house by the police where the pistol used in the robbery (exh P14A) was found. The appellant denied that he was the person who held the pistol or pointed the pistol to SP6 and said that there was a possibility of his identity being mistaken with that of Mat Yie by the prosecution witnesses. According to the appellant he resembled Mat Yie and the witnesses were mistaken him for Mat Yie.

[16] Two friends of the appellant testified as 'SD2' and 'SD3'. They testified in support of the appellant's case that the appellant resembles Mat Yie and hence the possibility of a mistaken identity on the part of the prosecution witnesses in their testimonies and their identification of the appellant in both the robbery incidents.

[17] At the end of the trial, the learned trial judge amended the first charge to a charge of gang robbery under s 395 read together with ss 397 and 34 of the same Code. The appellant was found guilty, convicted and sentenced with an imprisonment sentence of 15 years and two strokes of whipping. On the second charge, the appellant was convicted and imposed with a sentence of life imprisonment and six strokes of whipping.

APPEAL BY THE DPP

[18] We will first deal with the appeal of the learned DPP in Rayuan No T-05–119–05 of 2012. Essentially the learned DPP, Encik Wan Shaharuddin bin Wan Ladin (Encik Ahmad Ishrakh bin Saad with him) raises issues on the alleged failure of the learned trial judge to comply with procedures stipulated under the Criminal Procedure Code ('the CPC') in amending the first charge.

In particular it was submitted that the learned judge did not comply with ss 158 and 162 of the CPC. This is premised on the reasons that the learned trial judge failed to produce a draft judgment; failed to ensure the amended charge was read and explained to the appellant; failed to record any plea from the appellant and failed to offer an opportunity to the DPP to recall its witnesses to prove the amended charge. The learned DPP contended that these failures cannot be remedied under s 422 of the CPC. He submitted and urged this court to exercise the power under s 60 of the Courts of Judicature Act 1964, to set aside that part of the order by the trial judge.

[19] We agree with the learned DPP that there was nothing in the appeal records to show that the amended charge was read and explained to the accused as required under s 158(2) of the CPC. There was also no record that the prosecution was allowed to recall any witness under s 162 of the CPC after the learned judge amended the first charge. There was an amended draft of the first charge by the learned judge though, at p 287 of the appeal records.

[20] In his written judgment at paras 38–44, the learned trial judge justified and reasoned out why he amended the first charge. His main reason as set-out in his written judgment was because he found doubt as to the identity of the person who fired the shot towards SP6. There was also a doubt as to whom the shot was fired at.

[21] In arriving at that finding the learned trial judge analysed the following testimonies. Firstly the testimony of the appellant who denied that he was the one who fired a shot at SP6. Then there was the report in the daily 'Sinar Harian' made the next day after the incident quoting a source from SP6 that one of the robbers had a tattoo on his arm. The report stated that one of the robbers '... memakai topi dan kelihatan saperti ada tanda tatoo pada bahagian lengannya'. The reporter was Nik Mohd Rafik bin Abd Ghani who testified as 'SP4'. Contrary to SP4's evidence SP6 denied giving that information. The newspaper report is found at p 348 of the appeal records. The learned trial judge accepted the testimonies of SP4 as contemporaneous evidence. Meanwhile both eyewitnesses SP7 and SP8 testified that the gun was pointed to SP8 and not SP6.

[22] In re-evaluating the evidence on the whole after calling for defence and upon re-examining the testimonies of SP6, SP7 and SP8, the learned trial judge found discrepancies in the testimonies of the witnesses as to the identity of the person who fired a shot at Lee Jin Rong (SP6). It was also not clear whether the shot was fired at SP6 or SP8. For these reasons, the learned trial judge found that it was doubtful whether it was the appellant who fired the shot and whether the shot was fired at SP6.

[23] To constitute an offence under s 3 of the Firearms (Increased Penalties) Act 1971 as contained in the first charge, one important ingredient to be proven is that there must be a firing of the pistol by the appellant, with the intention to cause the death or injury to Lee Jin Rong (SP6). A doubt as to the identity of the person who fired the shot or to whom the shot was fired would not establish the offence under the first charge.

[24] We have no reason to depart from the finding of the learned trial judge that there was a doubt as to the identity of the person who fired the shot at SP6. The learned trial judge also had a doubt as to whether the shot was fired at SP6 or any other person. We are mindful that the learned trial judge who had audio visual advantage over the witnesses be in a better position to make that fact finding. Premised on these, we agree that the learned trial judge is entitled to amend the first charge. On the reasons given and on the facts and circumstances of the case, we are of the view that the learned trial judge had not erred in amending the first charge from an offence under s 3 of the Firearms (Increased Penalties) Act, to that of robbery under s 395 read together with ss 397 and 34 of the Penal Code.

[25] Page 287 of the appeal record revealed at that the learned trial judge drafted the amended charge. However there is no record indicating that the learned trial judge had read and explained the amended charge to the appellant as required under s 158 of the CPC, nor was any record made by the learned trial judge that he had allowed witnesses to be recalled under s 162 of the CPC.

[26] On the facts and the circumstances of the present case however, we are unable to agree with the submissions of the learned DPP that such non-compliance is fatal. We say so for the following reasons. Firstly, in our view in essence the ingredients of the offence under s 3 of the Firearms (Increased Penalties) Act 1971 are comparable to the ingredients under s 395 read together with s 397 of the Penal Code. For the purpose of comparison we produce below all the relevant provisions in extenso. Section 3 of the Firearms (Increased Penalties) Act 1971 is as below:

> Penalty for discharging a firearm in the commission of a scheduled offence
>
> 3 Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person shall notwithstanding that no hurt is caused thereby, be punished with death.

Sections 395 and 397 of the Penal Code read as follows:

> Punishment for gang-robbery
>
> 395 Whoever commits gang-robbery shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping.
>
> Robbery when armed or with attempt to cause death or grievous

397 If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon, or causes grievous hurt to any person, such offender shall be liable to be whipped, in addition to any other punishment to which he may be liable under any other section of this Code.

[27] An examination of the above three provisions of the law shows that the main distinction between an offence chargeable under s 3 with that of s 375 read together with s 379 as well as s 34 of the Penal Code lies in the required ingredient under s 3 that there must be a discharge of firearm in the commission of robbery (scheduled offence).

[28] In our view the learned trial judge was right in amending the first charge as there were sufficient evidence to support a charge under s 395 read together with ss 397 and 34 of the Penal Code in the relation to the first incident of robbery.

[29] The issue before us is whether in so doing the learned trial judge had caused a miscarriage of justice for failure to comply with the requirement of ss 158 and 162 of the CPC. On the compliance with s 158, the Supreme Court in the case of *Hee Nyuk Fook v Public Prosecutor* [1988] 2 MLJ 360 held that the requirement under s 158 is not always mandatory and the word 'shall' used in that provision does not ipso facto make it mandatory, but it would have to depend on the facts of each case. In that case the alteration of the charge in question was found to be technical in nature when the accused was originally charged for cheating in cash in the sum of RM40,000 but at the end of the prosecution case it was amended to cheating by way of a cash cheque in the sum of RM37,000 instead. The amended charge in that case was neither read nor explained to the accused by the trial judge. The Supreme Court held that on the facts of that case and a fortiori in the light of s 422 of the CPC the omission was not fatal, since the nature of the amendment was technical and not substantial.

[30] Returning now to the appeal before us, guided by the said Supreme Court decision in *Hee Nyuk Fook* we do not agree with the submission of the learned DPP that s 158 is a mandatory requirement on the facts of the present case. On the reason we have alluded to earlier that the nature of the amended charge is in essence quite similar in nature with that of the original first charge, there would be no prejudice to either party even if s 158 is not strictly observed.

[31] Furthermore, we agree with the finding made by the learned trial judge that on the facts and evidence found in the appeal records, there is overwhelming evidence to substantiate a charge under s 395 read with s 397 of the Penal Code in relation to the second robbery incident at the Yong Seng Tukang Emas shop. There were three eyewitnesses to the said incident. Besides SP6, his mother (SP8) and his neighbour (SP7) who live across the shop also

testified what they saw during the robbery. The robbed jewelleries (exhs 30A–K), the incriminating weapon (exh SP14A) and the baseball bat (exh P21) used in the crime were discovered following information emanating from the appellant. In the circumstances, we do not see how the prosecution case is compromised by the failure of the learned trial judge to comply with the procedural requirement when the evidence to support the amended charge is so overwhelming.

[32] Our next reason relates to s 167 of the CPC. Considering the facts and circumstances of the present case, in our view, the learned trial judge could have resorted to s 167 of the CPC instead. Section 167 allows the court to convict an accused for a different offence if the evidence reveals so, even though he was not charged with that offence. The requirement being that, it must be a case that comes within the ambit of s 166 of the CPC. The illustration to s 166 states that if a person is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating, he may be charged with theft, receiving stolen property or criminal breach of trust and cheating or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust, or cheating. On the facts and evidence of the present case, the learned trial judge could have invoked s 167 and convicted the appellant on the offence of gang robbery under s 395 read together with ss 397 and 34 without having to resort to amending the charge the way he did. In such a situation, there would be no necessity to comply with either s 158 or s 162 of the CPC. Thus the failure of the learned trial judge in the instant case would not be fatal and in the circumstances, we are of the view that no miscarriage of justice had been occasioned by the amendment undertaken by the learned trial judge.

[33] We further rely on the authority of the Federal Court case of *Mamasobri bin Useng v Public Prosecutor* [2011] MLJU 503; [2011] 6 CLJ 377 to fortify our decision. In that case, it was held that even though the learned trial judge misdirected on the burden of proof but in view of the overwhelming evidence presence in that case, there was no miscarriage of justice that has been occasioned because the learned judge would have come to the same conclusion anyway.

[34] For completeness, we would refer to the decision of this court in *Ng Terk Chai v Public Prosecutor and other appeals* [2013] 2 MLJ 375. In that case, the accused was acquitted and discharged of committing murder under s 302 of the Penal Code but was instead convicted under s 392 read together with s 397 as a result of the charge being amended by the trial judge. The learned judge however did not draft an amended charge. Neither was the charge read and explained to the accused as required under s 158 of the CPC. The Court of Appeal found that on the facts and evidence of that case, the amended charge

was inappropriate. The Court of Appeal held that the more appropriate charge would have been s 395 read together with s 397, which is an offence of gang robbery instead. For this reason the Court of Appeal found the procedural errors committed by the trial judge had occasioned a miscarriage of justice.

[35] The facts in *Ng Terk Chai* is distinguishable from the facts of this appeal in that, the nature of the offence under the first charge in the present appeal constitute almost the same ingredients with that of the amended charge by the learned trial judge. Unlike *Ng Terk Chai* we find the amendment by the learned judge appropriate on its own facts. Besides, we agree with the learned trial judge that on the facts and circumstances of the case, there were overwhelming evidence to support the amended charge.

[36] For all the above reasons we do not find merits in the grounds raised by the learned DPP and we dismiss the appeal in Rayuan No T-05–119–05 of 2012.

THE APPELLANT'S APPEAL

[37] The appellant in his petition raised a number of grounds of appeal. However, during his oral submissions, learned counsel Encik Ibrahim bin Kamaruddin (Encik Zulkifli bin Mohd Termizi and Encik Muhd Hisham bin Abdul Rahim with him) confined his argument to three main grounds. First, learned counsel urged this court to invoke s 114(g) of the Evidence Act 1950 against the prosecution for failure to produce relevant witnesses; as well as the failure to cause the pistol (P14A) used in the crime to be identified by the witness. The second ground of appeal centred on the issue of the identity of the appellant. Learned counsel submitted there was insufficient evidence adduced by the prosecution to prove the identity of the appellant. The third ground is on the failure of the prosecution to prove common intention under s 34 of the Penal Code.

Application of s 114(g)

[38] Learned counsel for the appellant argued that the robbery at both the goldsmith shops were committed by four persons namely Mohd Kamaruzahni bin Ngah, Mohd Shahdan, Mat Yie and the appellant. Mat Yie could not be traced. However the other accomplices Mohd Kamaruzahni bin Ngah (charged at the sessions court) and Mohd Shahdan, were not called to testify or offered to the appellant as witnesses. Another material witness was also the wife of the shop owner SP2 who was at the scene. The failure by the prosecution to produce these witnesses, it was submitted by learned counsel would create an adverse presumption and invite the invocation of s 114(g) of the Evidence Act 1950 against the prosecution. Learned counsel relied upon the Federal Court

case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1, the Supreme Court case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ (rep) 221 and *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; [1985] CLJ (Rep) 19.

[39] It must be noted that a prima facie case was made out by the prosecution on the evidence before the court as found by the learned trial judge. The learned judge relied on the testimonies of SP2 which he had carefully scrutinised. The evidence of SP2 does not require any corroboration in law. A prima facie case was made out without any of the testimony of the witnesses suggested by learned counsel. That being the case, there was no necessity for the prosecution to bring forward any other witness to establish its case.

[40] In any given case the right to call a witness to prove a case lies with the prosecution as decided in *Jazuli bin Mohsin v Public Prosecutor* [1990] 2 MLJ 190. In *Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510, the failure of the prosecution to adduce evidence of the other co-gamblers cannot draw a presumption against the prosecution unless the witnesses are essential to the case of the prosecution. It is settled law that provided there is no wrong motive the prosecution has the discretion as to what witnesses should be called (see Federal Court case of *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149). In the present case the prosecution had discharged its burden and had established a prima facie case. There would be no adverse inference that can be drawn though other witnesses were not before the court (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705).

[41] We also note from the appeal records at p 328 that all the prosecution witnesses listed were in fact offered to the defence. As such we agree with the learned DPP that there is no issue of withholding or suppression of evidence on the facts of the present case. A suppression of evidence envisaged by s 114(g) can only be invoked if there is suppression of material witness and not just any witness (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ (rep) 221).

Identity of the appellant

[42] Learned counsel for the appellant contended that the learned trial judge was in error in relying on the evidence of SP2 to identify the appellant. Learned counsel argued that there were material discrepancies in the testimonies of SP2 both on the identity of the appellant as well as the non-identification of the pistol used by the appellant, in the commission of the robberies. For these reasons the testimonies of SP2 was submitted to be weak and inconsistent.

[43] In his written judgment, the learned trial judge found that the testimonies of SP2 was clear in establishing the identity of the appellant. He supported this finding with well analysed reasons. The learned trial judge found SP2 was clear in recounting how the appellant first went into his shop on the pretext of cleaning a silver bracelet and returned again soon and was pointing a gun to him throughout the incident. SP2 clearly testified that he was looking at the appellant's face for at least five minutes from a distance of about four to five meters away. Taking the evidence of SP2 as a whole, the learned trial judge found the evidence of SP2 unshaken despite being severely cross-examined.

[44] The finding of facts and the credibility of a witness made by the learned trial judge should not be unnecessarily interfered with, unless there is clear appealable error that merits intervention. SP2's evidence had convinced the learned trial judge on the identity of the appellant which the learned trial judge is entitled to do. Despite the lack of identification parade, it did not affect the prosecution's case as decided in *Arumugan s/o Muthusamy v Public Prosecutor* [1998] 3 MLJ 73 which accepted 'dock identification' without an identification parade conducted.

[45] The pistol used in the commission of the crime was tendered as exh 14A. There was no dispute that a gun was used in the robbery. Thus, although exh 14A was not identified by SP2, it was never raised as an issue during the trial. The appellant did not challenge the testimonies of SP2 that a gun was pointed at him during the robbery. We refer to the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551 where it was held that there is no law that says any failure to produce all the exhibits found is fatal to the case of the prosecution. Even the need to tender any exhibit would depend on the facts of each particular case. In the present case the evidence is clear that the appellant was pointing a gun to SP2 and thus whether or not SP2 identified the gun used is quite immaterial. Moreover, the incriminating weapon was discovered in a pail behind the house of the appellant's father, as a result of the information given by the appellant himself. After the arrest the appellant was taken by the police team to show the incriminating weapon. That was clearly stated in the testimony of the appellant himself. In view of such clear evidence, there would be no necessity to identify the pistol by SP2.

Common intention

[46] Learned counsel contended that the prosecution failed to prove common intention under s 34 as there was no evidence to support a pre-arranged plan was made. The law on common intention is trite. The learned judge found that in both the incidents the same *modus operandi* was

employed by the appellant. The robberies were committed using the same car where the appellant was armed with a pistol while the other two came into the shop, broke the show case and removed the jewelleries with the appellant holding guards on the victim. We agree with the learned judge that the *modus operandi* employed disclosed that each of them knew their respective roles and this could not have happened without any planning.

[47] In conclusion, we do not find merit in the grounds raised by the appellant in Rayuan No T-05–118–05 of 2012. On the evidence before us as found in the appeal records we find the conviction of the appellant safe. The appeal is dismissed and we affirm the conviction and sentence by the learned trial judge.

Appeal and cross-appeal dismissed.

Reported by Kanesh Sundrum